## UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

KONINKLIJKE KPN N.V.,	Case No. 2:21-cv-113

Plaintiff,

JURY TRIAL DEMANDED

VS.

TELEFONAKTIEBOLAGET LM ERICSSON and ERICSSON INC.,

Defendants.

KPN'S MOTION TO STRIKE PORTIONS OF THE EXPERT REPORTS OF WICKER AND SALTERS

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# I. Introduction

KPN moves to strike certain opinions	disclosed by Ericsson experts Dr. Stephen Wicker
and Ambreen Salters as unreliable and mislea	ding. In his infringement rebuttal report, Wicker
offers	
	g. Salters, in turn,
	. Additionally, Salters
,	
II. Legal Standard	
"The relevance prong [of Daubert] re	equires the proponent [of the expert testimony] to
demonstrate that the expert's 'reasoning or me	ethodology can be properly applied to the facts in
issue." Johnson v. Arkema, Inc., 685 F.3d 4	452, 459 (5th Cir. 2012) (citation omitted). "The
reliability prong mandates that expert opinion	'be grounded in the methods and procedures of
science and be more than unsupported specu	lation or subjective belief." <i>Id</i> .
III. Argument	
A. Wicker's opinions on should be struck.	are unsupported and
Wicker offers two categories of opinion	ns that are unreliable and should be excluded.
<i>First</i> , Wicker purports to opine on how	v to

Ex. 1 ¶¶ 570-620. He addresses

E. Yet Wicker did

not		
	(id. ¶ 582):	
See also id. ¶¶ 595, 601,	615, 620 (	
).		
Wicker's		
		Robroy IndusTex.,

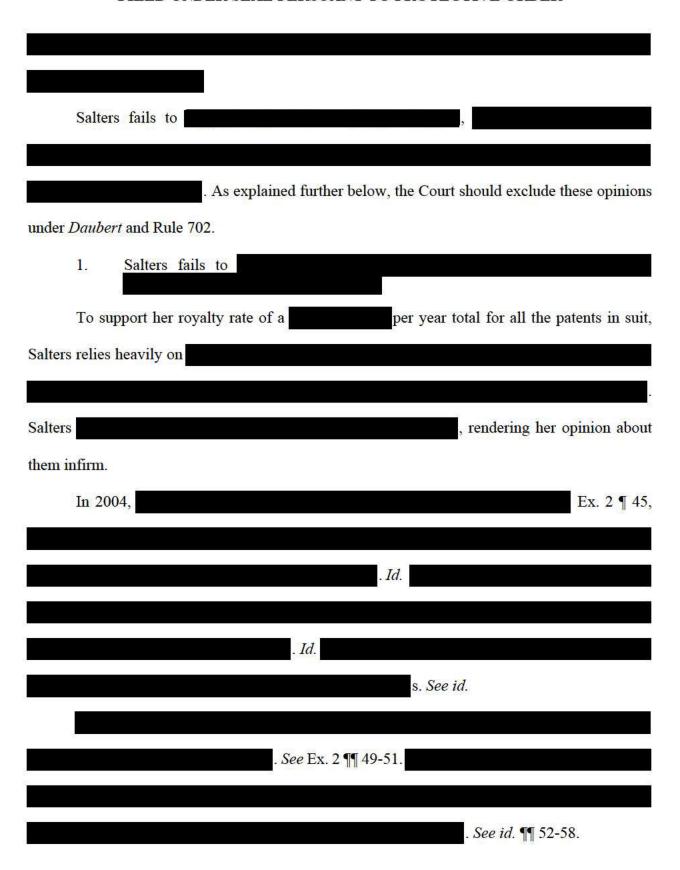
LLC v. Thomas & Betts Corp., No. 2:15-CV-512-WCB, 2017 WL 1319553, at \*9 (E.D. Tex. Apr. 10, 2017) (noting that "denominating a witness as an expert does not give that witness leave to simply read materials such as exhibits and depositions in the case and then testify as to their contents"); Lidos Display, LLC v. Chi Mei Innolux Corp., No. 6:11-CV-00201-JRG, 2017 WL 1322550, at \*6 (E.D. Tex. Apr. 6, 2017) ("approaches to apportionment" that rely on "arbitrary divisions based on the number of claims, process steps, or contact holes without any connection to the economic demand for the claimed technology" do not "pass muster under Rule 702"). Indeed, this Court has recently concluded as much:

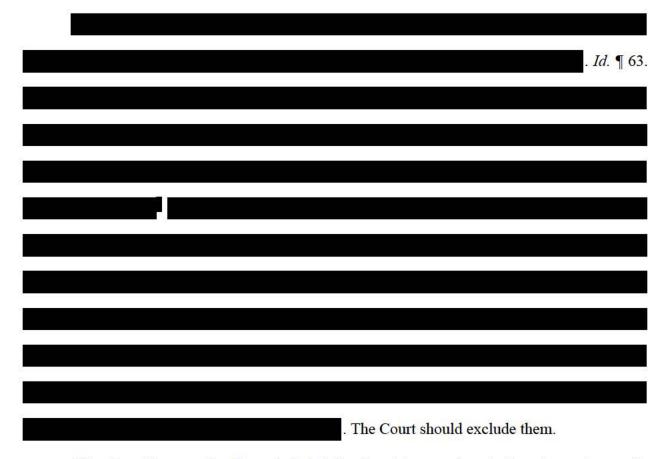
However, assuming arguendo that each patent of the fifty Apple DRM patents were practiced in the FairPlay functionality at the time of infringement, *Mr. Thomas cannot assume that each patent has equal value*. The exercise of performing an apportionment analysis is to separate the specific value of the patents-in-suit using reliable known methods. It would be unscientific to make a conclusory assumption that each patent has equal value. Indeed, not all patents are created equal.

<sup>&</sup>lt;sup>1</sup> The *Robroy* order ultimately struck portions of testimony from Salters (the same Ericsson expert discussed below) regarding causation.

Personalized Media Communications, LLC v. Apple, Inc., No. 215CV01366JRGRSP, 2021 WL 662237, at \*7 (E.D. Tex. Feb. 20, 2021) (emphasis added) (citations omitted).

Second, Wicker
. Ex. 1 ¶ 265. Nothing
in
. See id. $\P\P$ 5-7. Further,
In short, as demonstrated by his own report, Wicker
should be excluded. See Watkins v. Telsmith, Inc., 121 F.3d 984, 992 (5th Cir. 1997) ("Where are
expert bases his opinion in part on his experience with similar machines, we cannot fault the cour
for demanding a more detailed recollection of the expert's review and understanding of similar
machines than was reported by [the expert].").
The Court should exclude Wicker's opinions in ¶¶ 265, 582, 595, 601, 615, and 620 of his
report.
B. The Court should exclude Salters' unsupported damages opinions.
Ericsson damages expert Ambreen Salters offers





This Court has previously excluded Salters' opinions under similar circumstances. In *Biscotti v. Microsoft Corp.*, Salters (testifying for the defendant) relied on two HDMI licenses for her damages analysis. No. 2:13-cv-01015-JRG-RSP, 2017 WL 2607882, at \*3 (E.D. Tex. July 27, 2020). But neither Salters nor Microsoft's technical expert opined on the technical comparability of these licenses. *Id.* Salters also "fail[ed] to account for (or even address) the fact that the HDMI licenses [we]re to patents alleged to cover a standard, which subjects the patents to RAND obligations" that require a "difference in application of the *Georgia-Pacific* factors." *Id.* At \*4.

."Ex. 3 ¶ 18.

Salters' failure to even attempt to account for this significant economic difference "warrant[ed] exclusion." *Id*.

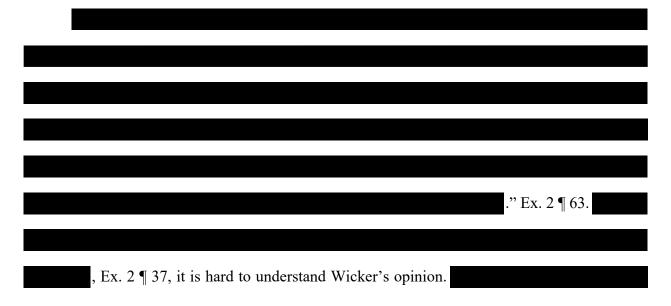
The same result is required here. The
. As discussed in <i>Biscotti</i> , licenses to standard essential patent
reflect important economic differences that must be accounted for when using them to analyze
hypothetical negotiation over patents that have not been proven to be FRAND-encumbered. <i>Id</i>
. <i>Compare</i> Ex. 2 ¶ 50
), with Ex.
) at 2 (
TS 21.299) and Ex. 6 (KPN-ERICSSON_00045405) (
).
Salters ignores
. Se
generally Ex. 2. This renders her reliance on and offers fundamentall

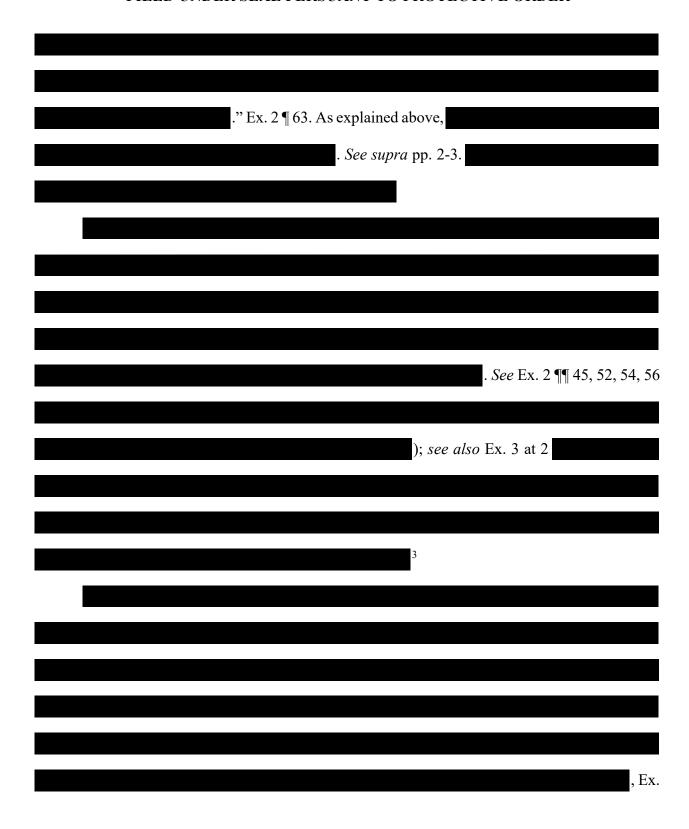
unreliable and speculative, warranting exclusion. *See Biscotti*, 2017 WL 2607882, at \*4; *M2M Sols. LLC v. Motorola Sols., Inc.*, No. CV 12-33-RGA, 2016 WL 767900, at \*8 (D. Del. Feb. 25, 2016) ("Mr. Donohoe has failed to show how these two large, worldwide, standard-essential, FRAND patent portfolios are economically comparable to a license that the parties would have negotiated for a single asserted patent.").

See Ex. 3 at 3.1; Ex. 7; Ex. 8 at KPN-
Ericsson_00053172; Ex. 9 at KPN-Ericsson_00053183.
to KPN. See Ex. 2 ¶¶ 50, 59. Her reason for doing so does not survive Daubert scrutiny.

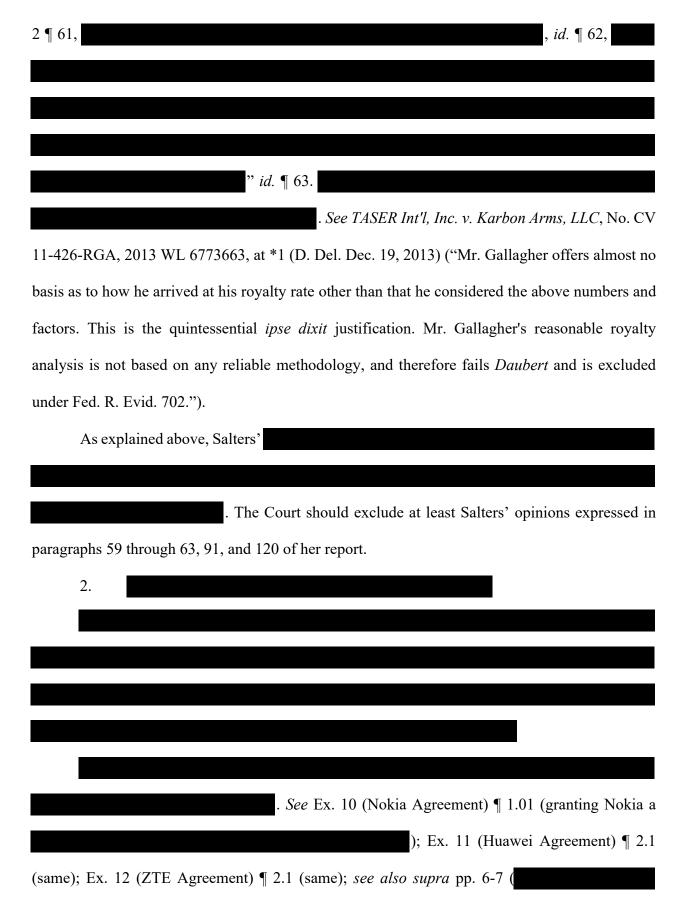
Ex. $2  ext{ }  ext{ }  ext{59}$ . As a result, her opinion is unreliable. See Apple Inc. $v$ .
Wi-LAN Inc., 25 F.4th 960 (Fed. Cir 2022) (expert's reliance on =agreements as comparable should
be stricken where expert failed to reliably address the extent to which "other patents" licensed in
the agreement "contributed to the royalty rate").
"Ex. 2¶ 60.
<i>Id.</i> ¶ 61.
Salters' approach is inconsistent with 35 U.S.C. § 284, which provides that "[u]pon finding
for the claimant the court shall award the claimant damages adequate to compensate for the
infringement, but in no event less than a reasonable royalty for the use made of the invention by
the infringer" In other words, patent damages are to compensate the patent owner.
LaserDynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 76 (Fed.Cir.2012) (the
hypothetical negotiation "seeks to discern the value of the patented technologies to the parties in
the marketplace" (emphasis added)). The court cannot award

This opinion should be stricken under bedrock patent law. For example, in Albritton v. Acclarent, Inc., the defendant's expert's "cost-based apportionment analysis" was excluded as unreliable because the value of "the patented functionality" is derived from its "contribution to the larger operation of the device as a whole," and "[t]here is little, if any, connection between that function and the pure cost of the component." No. 3:16-CV-03340-M, 2020 WL 11627275, at \*11 (N.D. Tex. Feb. 28, 2020); see MLC Intellectual Property, LLC v. Micron Technology, Inc., 10 F.4th 1358 (Fed. Cir. 2021) (affirming exclusion of damages opinion that "goes well beyond what the [purportedly comparable] clause implies and is incompatible with the [] agreement as a whole"); Douglas Dynamics, LLC v. Buyers Prods. Co., 717 F.3d 1336, 1346 (Fed. Cir. 2013) ("[A]n infringer's net profit margin is not the ceiling by which a reasonable royalty is capped."); SIMO Holdings Inc. v. Hong Kong uCloudlink Network Tech. Ltd., 396 F. Supp. 3d 323, 344 (S.D.N.Y. 2019), modified in part, No. 18-CV-5427 (JSR), 2019 WL 7816487 (S.D.N.Y. Dec. 11, 2019), clarified on denial of reconsideration, No. 18-CV-5427 (JSR), 2020 WL 498200 (S.D.N.Y. Jan. 22, 2020) (exclusion of defendant's damages opinion warranted where expert improperly "started from net profits").



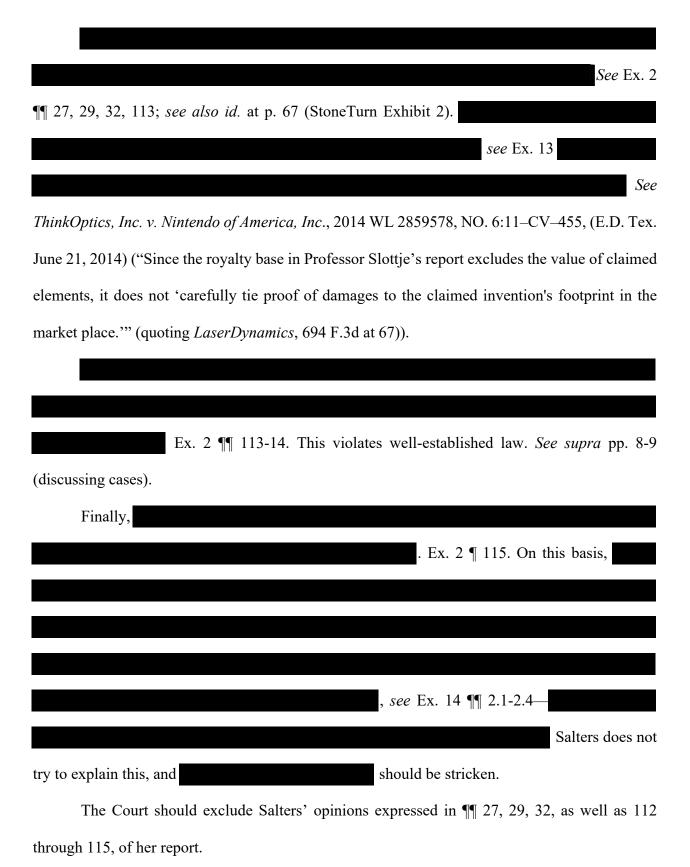


<sup>&</sup>lt;sup>3</sup> In fact, in direct contravention of hornbook patent law, . *See infra* pp. 13-14.



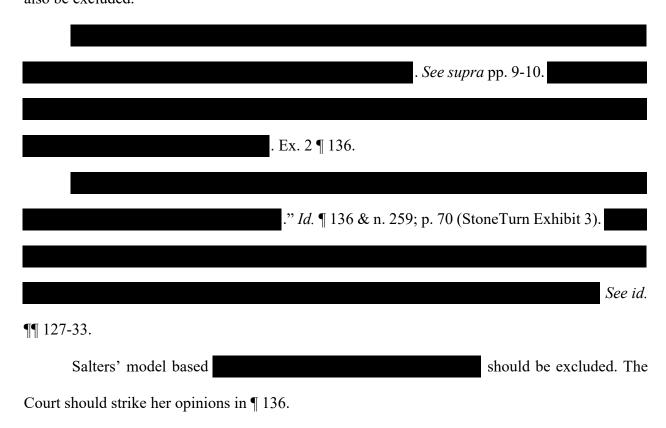
).	
Second,	
. Ex. 2 ¶¶ 69, 78, 82.	
. Ex. 2       09, 70, 02.	
Third,	
. Ex. 2 ¶ 68.	
, see supra pp. 8-9,	
. See Ex. 2 $\P$ 68, p. 73 (StoneTurn Workpaper 6).	
W.G I. 57. 20. 0	
." See id. ¶ 79 & n. 170.	
	<i>Id.</i> ¶ 83.

Fourth, and finally,
See, e.g., Ex. 10 at 3; Ex. 11 at 2. This alone is reason to exclude her
opinions. See supra pp. 9-10.
The Court should exclude Salters' opinions expressed in ¶¶ 68, 69, 78, 79, 82, 83, 85, 86
91, and 120 of her report.
3. Salters'
As an alternative model,
. Ex. 2¶111.
Id.
. <i>Id.</i> ¶ 112.
see, e.g., Ex. 13 at Claim 1,
Bayer HealthCare LLC
v. Baxalta Inc., No. 16-CV-1122-RGA, 2019 WL 330149, at *3 (D. Del. Jan. 25, 2019).





In the guise of rebutting KPN Damages expert Michael Wagner, Salters offers a fourth and final damages model. It is unreliable for the same reasons as her affirmative opinions, and should also be excluded.<sup>4</sup>



\* \* \*

For the reasons stated above, KPN respectfully requests the Court exclude Wicker's opinions expressed in  $\P$  265, 582, 595, 601, 615, and 620 of his report, and Salters' opinions expressed in  $\P$  27, 29, 32, 59-63, 68, 69, 78, 79, 82, 83, 85, 86, 91, 112-15, 120, and 136 of her report.

<sup>&</sup>lt;sup>4</sup> Salters may, of course, testify about her disclosed criticisms of Wagner to the jury. But she may not use those criticisms to attempt to support an unfounded and unreliable revision of Wagner's model.

Dated: May 16, 2022 Respectfully submitted,

/s/ Andres C. Healy

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## **CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL**

I hereby certify that the foregoing document is being filed under seal pursuant to the Protective Order entered in this matter.

/s/ Adam Tisdall
Adam Tisdall

## **CERTIFICATE OF CONFERENCE**

I hereby certify that the parties have conferred on May 16, 2022, about this motion and that counsel for Defendants are opposed to this motion.

/s/ Adam Tisdall
Adam Tisdall

# **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record on May 16, 2022.

/s/ Adam Tisdall
Adam Tisdall